July 2011 - Vermont Bar Examination Essay Questions - Model Answers

MODEL ANSWER - QUESTION 1 - July 2011

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) will not be answered here.

MODEL ANSWER - QUESTION 2 – July 2011

PLEASE NOTE: QUESTION 2 was a "Multistate Performance Test" (MPT) will not be answered here.

MODEL ANSWER - QUESTION 3 – July 2011

1. Discuss the procedural steps and applicable rules of Vermont Civil Procedure by which Betsy might seek court intervention to obtain the use of the driveway and gravel drive for her second summer session beginning on July 25.

Betsy should seek a preliminary injunction (hereinafter "PI") pursuant to V.R.C.P. 65(b). She would start that process by filing a complaint with the Superior Court Civil Division in the county where Shelberg is located.

Betsy should ask the court to set a PI hearing as soon as practicable but clearly prior to July 25. Once the court set the date of the hearing for the preliminary injunction, Betsy would then be required to serve Adam with the notice of hearing, a summons and complaint and her motion for PI. See V.R.C.P. 4 To succeed on her PI motion, Betsy would need to show that there was a substantial likelihood of irreparable harm to her business if she was not allowed access to Camphaven by the July 25th summer session and that she was likely to succeed on the merits of her claim due to Adam's actions. Unless waived for good cause shown, the court will require Betsy to provide security in the amount of any possible damages to Adam arising from the issuance of the PI. See V.R.C.P. 65(c).

Betsy should also provide the court with a proposed order that specifically details her allowable use of Adam's driveway and the gravel road now and in the future, with specific reference to the right-of-way location. See V.R.C.P. 65(d). Finally, Betsy should seek to consolidate the merits hearing and the PI hearing, as permitted under V.R.C.P. 65(b)(2), because of the similarity of issues to be decided by the court.

2. Discuss what arguments Betsy should make in order to obtain permanent relief through reformation of the easement in the deed.

Betsy should argue that the deed was affected by mutual mistake which fails to convey

the true intent of the parties. The court may act in equity to correct the deed to manifest the parties' true intent. See Cassani v. Northfield Savings Bank, 179 Vt. 204 (2005).

Alternatively, Betsy could argue that Adam is equitably estopped from preventing her from using the gravel road give that Adam was aware of her intended use of the Camp Parcel as a summer camp for children, and he saw her use the driveway and gravel road on numerous occasions and never told her about the "Old Road" and his alleged unstated intent of its use for the Camp Parcel.

Furthermore, the "Old Road" does not even reach the Camp Parcel so it is not appropriate for ingress and egress to the Camp Parcel.

3. Discuss what other arguments Betsy should make to obtain an easement to access Camphaven other than reformation of the easement in the deed.

Betsy could argues for the creation of an easement by necessity over the paved driveway and gravel road. As the "Old Road" does not reach the Camp Parcel, this lot is thus landlocked and an easement by necessity is required.

The issue becomes whether Adam must grant a 10 foot easement from the "Old Road" to the Camp Parcel, or if Betsy can require the easement to go over Adam's paved driveway and the gravel road.

4. If Adam were to sue Betsy for trespass, discuss what defense(s) Betsy should rise and through what procedure they must be asserted to be properly preserved for trial.

If Adam were to sue Betsy for trespass, Betsy must raise in her answer the affirmative defense of laches. V.R.C.P. 8(c). Laches is an equitable defense that states that Adam has waived his rights to complain about Betsy's trespass on his land by his failure to object earlier to her use of the paved driveway and gravel road to access the Camp Parcel. See Vermont National Bank v. Dowrick, 144 Vt. 504 (1984).

MODEL ANSWER – QUESTION 4 -- July, 2011

1—Client and Friend have formed a partnership. "[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." 11 V.S.A. §3212(a). The absence of a written agreement does not affect their relationship. Client and Friend each have a fifty percent interest in the partnership.

2—To the extent that a partnership agreement does not define the rights and liabilities of partners, those rights and liabilities are defined by statute and common law governing partnerships. 11 V.S.A. §3203(a).

Friend's claim to ownership of the trade name is not valid. The statute provides: "Property acquired by a partnership is property of the partnership and not of the partners individually." 11 V.S.A. §3213. Friend may argue that he has the right to the name because it was his idea and he paid for the name. "Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes." 11 V.S.A. §3214(d). While Friend conceived of and registered the trade name, the name was used as partnership property. This occurred after the parties had agreed on their partnership. The registration occurred after the formation of the partnership, and under circumstances that demonstrate the trade name was intended to be used by the partnership for its business. These circumstances would overcome any claim by Friend that he is presumed to own or in fact owns the trade name; it is an asset of the partnership.

Client, however, needs to take steps to protect the partnership interest in the trade name. If Rival purchased the trade name without notice of the partnership interest, or Friend's inability to convey the trade name, competitor could acquire rights in the trade name that are superior to the partnership. Client should give immediate notice to Rival that Friend lacks the authority to transfer the trade name. 11 V.S.A. §3222(b)(1).

3—Client should file an action seeking the expulsion of Friend from the Partnership. A court may order the expulsion of a partner if the court determines:

(A) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;
(B) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under section 3234 of this title; or

(C) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner;

11 V.S.A. § 3251. Friend's behavior justifies expulsion under this standard. Friend's refusal to honor the agreement to each work full time, and the threat to sell important partnership property justifies expulsion under each of these three tests. Client can file an action and obtain an order expelling Friend from the Partnership.

Expulsion, however, comes at a price. Expulsion is a type of dissociation. Under the law, a dissociated partner has the right to be paid for her or his partnership interest. The buyout price is set as of the date of dissociation. The price is the greater of: a) the partner's share in the liquidation value of the partnership, or, b) the value of the business if sold as a going concern without the dissociated partner. The buyout price would be offset by the value of any claims against Friend for failing to work for the partnership.

4—Client has three options for owning and operating the business. Client can operate the business as a sole proprietorship. The benefit of this form is simplicity. The Client would transfer the registration of the trade name into his own name, and otherwise operate the business without other formalities. The disadvantage is that Client would be personally liable for all business losses. If Client wishes to avoid personal liability, there are two options under Vermont law.

Client could organize a limited liability company. A limited liability company requires the filing of articles of organization with the Secretary of State. The name must disclose that the entity is a limited liability company (i.e., LLC, or Ltd., or other authorized expression). The articles must also provide whether the LLC is managed by a manager (which is not likely for Client) or managed by members. The articles must further specify whether the LLC is for a limited term. The LLC provides Client with the advantage of potentially avoiding personal liability for business losses, assuming Client complies with the legal obligation of providing adequate notice to others of the LLC and operating the LLC as a distinct entity. Client can also provide for the potential admission of new members and other governing procedures in a membership agreement. Absent an election to the contrary, the LLC would be a "pass through" entity for tax purposes; profits would only be taxed once.

Finally, client could organize a for profit corporation under the Vermont Business Corporations
Act. This option would require Client to file Articles of Incorporation with the Vermont Secretary of State, establish bylaws, and issue shares. The Corporation would be obligated to hold regular meetings. A corporation could also qualify for "pass through" taxation if it is organized under Subchapter S of the Internal Revenue Code and it files a timely election with the IRS.

(If Client chose to own the business with another person, client would have the additional option of establishing a limited liability partnership. 11 V.S.A. §3291. Because Client appears to be the sole owner of this business, this option is not available.)

Limited liability can be very valuable for small business owners. Thus, the sole proprietorship is not a prudent course for Client. For small businesses like Client's, the added burdens of formal meetings and documentation do not justify selection of a corporate model. Client would be best served by a limited liability company.

MODEL ANSWER – QUESTION 5 -- July, 2011

1. Was it lawful for Trooper Trudeau to enter upon Doris Driver's property? Discuss.

Yes. The Fourth Amendment to the U.S. Constitution requires that an officer have a reasonable suspicion of criminal activity prior to making an investigatory "stop." Although there was no literal "stop" here, a "stop" is a shorthand way of referring to a

seizure that is more limited in scope than an arrest. *See State v. Jestice,* 2004 VT 75. When the stop is based on an anonymous tip, the information communicated must be reliable under the totality of the circumstances in order to satisfy the reasonable suspicion requirement. *State v. Lamb,* 168 Vt. 194 (1998).

Here, the "informant" was not anonymous. He provided his name, and in fact met with Trooper Trudeau in person in front of the home and reported that he had observed the vehicle drive to 15 Wildflower Terrace. Although Citizen's description of the vehicle differed in three respects (vehicle was black, not green; license plate was discrepant by one digit; and no male operator was located), Trudeau was able to confirm that the vehicle was registered to the residents of 15 Wildflower Terrace, the vehicle was still wet when Trudeau observed it in the garage, and except for the color, the other observations matched Citizen's report. Finally, Driver admitted that she had driven the vehicle, and was sitting in the vehicle at the time of being questioned, getting ready to operate it for a second time.

The totality of these circumstances were sufficient to support Trudeau's reasonable suspicion that a person who resided at 15 Wildflower Terrace had been driving under the influence. Citizen's report was sufficient to positively identify Defendant's vehicle, corroborating the informant's observations and the path of travel of the vehicle. Thus, this information concerned "a crime in progress," that was observable by anyone in sight of its commission. *State v. Boyea,* 171 Vt. 401 (2000). Although the color of the vehicle, plate number and gender of the driver were discrepant, Trudeau was operating on more than just a "hunch," given Citizen's report of his first-hand observations of Defendant's erratic driving.

2. Was Trudeau's visual search of Defendant's garage lawful?

The garage is part of the so-called "curtilage" of the home which is extended the same protection from unreasonable searches and seizures as the home itself under the Fourth Amendment and the Vermont Constitution. *State v. Bryant,* 2008 VT 39. Areas such as driveways, walkways, and steps are not protected by the Fourth Amendment to the same extent as the home and curtilage, however, because they are customarily used as the access route for anyone visiting the premises. *State v. Libbey,* 154 Vt. 646. Further, an officer does not conduct an unlawful search and seizure when he observes articles within "plain view" of an otherwise lawful vantage point. *State v. Bauder,* 2007 VT 16.

Here, Trudeau walked down the driveway toward the Defendant's garage. He did not violate the Fourth Amendment in arriving at the garage window because he was permitted to walk up the driveway. Thus, what he observed through the garage window was from a legal vantage point. It makes no difference that he used a flashlight to look through the garage window because use of artificial means to illuminate a darkened area does not constitute a search for Fourth Amendment purposes. *Texas v. Brown,* 460 U.S. 730 (1983), *State v. Bauder,* 2007 VT 16.

3. Are Driver's statements in response to Trudeau's initial questions from the vehicle in her garage admissible against her? Discuss.

Yes. Under *Miranda,* police must stop questioning a suspect who is in custody after he requests to speak with an attorney. This requirement is not present when suspects are not in custody. *State v. Pontbriand,* 2005 VT 20. Although a suspect may be detained during a traffic stop, such that he may not feel free to leave without the investigating officer's permission, such detention does not require a *Miranda* warning absent an indication that the suspect was subject to they type of restraints comparable to a formal arrest. *State v. Gemler,* 2004 VT 3. Here, when Trudeau questioned Defendant in her car, she was detained, but not under arrest or otherwise in custody for *Miranda* purposes, and therefore required no *Miranda* warnings. Thus, there is no basis to suppress Defendant's statements under *Miranda.*

4. Did Trooper Trudeau have probable cause to ask that Driver step outside of the garage to perform sobriety tests? Discuss.

Yes. For purposes of an investigatory stop, an "exit order" is justified when the officer has sufficient objective facts that would cause a reasonable officer to believe the exit order was necessary to protect the officer's or another safety, or to investigate a suspected crime. *State v. Sprague,* 2003 VT 20. Although this case does not involve a motor vehicle stop, Trooper Trudeau had a reasonable suspicion that Defendant had operated the vehicle in the garage – and was about to operate it a second time – in a manner described by Citizen as erratic. Trudeau smelled alcohol on Defendant's breath and noticed that her speech was slow and her eyes were watery. Based on these objective facts, Trudeau's request that Defendant exit her vehicle to perform sobriety tests was not unreasonable.

MODEL ANSWER - QUESTION 6 - July 2011

PLEASE NOTE: QUESTION 6 was produced by the NCBE and no model answer is provided here. Those model answer will be available on the NCBE's website www.ncbex.org at a later date.

MODEL ANSWER - QUESTION 7 - July 2011

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